

**STATE PERSONNEL BOARD, STATE OF COLORADO**

Case No. 98B018

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**INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE**

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ROBERT SCOTT HELFER,

Complainant,

vs.

DEPARTMENT OF TRANSPORTATION,

Respondent.

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THIS MATTER came on for hearing before Administrative Law Judge Robert W. Thompson, Jr. on February 9, 1998. Respondent was represented by Assistant Attorney General Michael E. King. Complainant appeared and was represented by Nora V. Kelly, Attorney at Law.

Respondent called the following witnesses: Complainant, Program Assistant Donna Archuleta, Transportation Engineer David Dennis and Douglas Rames, Regional Director for Region 4, Colorado Department of Transportation.

Complainant testified on his own behalf and called as character witnesses Dennis Wolfard and Dennis Palamet of the Office of the State Comptroller.

Respondent's Exhibits 1, 2, 4, 5, 6, 8, 9 and 11 were admitted into evidence without objection. Exhibits 7, 10 and 12 were admitted over objection.

Admitted by stipulation were Complainant's Exhibits A, BB and CC. Exhibits S, M and DD were admitted over objection. Exhibits G and J were excluded.

### **MATTER APPEALED**

Complainant appeals a disciplinary one month, one step reduction in pay.

### **ISSUES**

1. Whether respondent's action was arbitrary, capricious or contrary to rule or law;
2. Whether Directive 10.0 was unconstitutionally applied to complainant;
3. Whether complainant is entitled to an award of attorney fees and costs.

### **PRELIMINARY MATTERS**

Respondent's Motion to Strike Complainant's Second Supplemental Amended Prehearing Statement, filed on February 4, 1998, was granted. Respondent's motion to exclude character testimony was denied. See *Knowles v. Board of Education*, 857 P.2d 553 (Colo. App. 1993). Complainant's motion to sequester the witnesses was granted.

## **FINDINGS OF FACT**

1. Complainant Robert Scott Helfer has been employed by respondent Department of Transportation (DOT) as an Accountant II since January 6, 1994. He has been a state employee for approximately fifteen years.

2. On November 19, 1996, Helfer was issued a formal corrective action by Regional Transportation Director and appointing authority Douglas Rames delineating thirteen areas in which Helfer was instructed to improve his job performance and working relationships with co-workers. (Exhibit 5.)

3. Helfer grieved the corrective action, which was upheld at Step 4. The grievance included complaints against David Davis, who was his immediate supervisor. Helfer was allowed to transfer to a different supervisor.

4. On February 3, 1997, Rames issued a second corrective action to Helfer for failure to make satisfactory progress in improving his job performance and working relationships. (Exhibit 6.)

5. By letter dated March 3, 1997, Rames advised Helfer that his performance had improved and the corrective action was "concluded." Rames cautioned Helfer in the letter that there was a continuing need to "improve the working relationships with all of the staff." (Exhibit A.) Neither corrective action was removed from Helfer's personnel file.

6. In the morning of June 30, 1997, Helfer went to the office of co-worker Donna Archuleta to discuss furniture he had

received which was different from the furniture he had told her to order for him. Standing in the doorway while Archuleta was seated at her desk, Helfer asked if he could see her, to which she responded in the affirmative. Helfer entered the office and walked uninvited behind the desk to where Archuleta was sitting. Helfer asked why she had not ordered the furniture he wanted. Archuleta explained that the order had been changed by Helfer's supervisor, and that was the person he should talk to. Helfer held a piece of paper about eight inches from Archuleta's face and said, "So, you did not order what I told you." He leaned toward Archuleta, brushing against her body. He elevated his voice and spoke angrily. His face was red. Archuleta felt fear and intimidation. In a raised voice, she told him to leave her office. Helfer ignored her and went on talking. Finally, Archuleta said in a strong voice, "You have to leave my office now," whereupon Helfer left.

7. Archuleta's immediate supervisor, David Davis, having heard part of the conversation from his adjacent office and which he would describe as confrontational, went into her office to see if she was okay because he was concerned about her welfare. He noticed that she was visibly shaken.

8. That day, Archuleta discussed the incident with Helfer's supervisor and with the EEO representative, who advised her to inform Doug Rames in writing. She then became engrossed in fiscal activities involving the change of the fiscal year.

9. Recalling two earlier incidents when Helfer had become furious and shouted at her, Archuleta wrote to Rames describing the June 30 incident. (Exhibit 7.)

10. In response to Archuleta's memo, Rames held a predisciplinary meeting with Helfer on July 16, 1997. Helfer disputed Archuleta's allegations.

11. Davis discussed the incident with Rames and followed up with a memo. (Exhibit 9.)

12. Rames took into consideration Helfer's statements, interviews with Archuleta and Davis, the two prior corrective actions, comments in past performance appraisals pertaining to observed inappropriate behavior, and Directive 10.0, DOT's workplace violence policy designed to "foster a safe and healthy work environment by reducing the risk of threat and violence in the workplace." (Exhibit 2.)

13. Rames concluded that Helfer's behavior of June 30 constituted willful misconduct. On August 4, 1997, he imposed the discipline of a one step reduction in pay for one month. (Exhibit 4.)

14. Helfer earns between \$3,300 and \$3,400 per month. The pay reduction amounted to slightly more than \$200.

15. Complainant filed a timely appeal of the disciplinary action on August 15, 1997.

16. Following the notice of appeal, Helfer was granted administrative leave with pay to attend his deposition. He was denied administrative leave to attend the depositions of other witnesses in the case and to meet with his attorney. He used annual leave on these occasions.

## **DISCUSSION**

Respondent urges that it satisfied its burden to prove just cause for the discipline.

Complainant mounts a three-pronged attack on the appointing authority's decision imposing discipline. First, complainant submits that the disciplinary action cannot be based on Directive 10.0 because his conduct did not involve physical violence. Second, he claims that the disciplinary action was done in retaliation for the filing of a grievance. Third, he contends that the second corrective action was a continuation of the first one and cannot serve as the basis for discipline because it was concluded.

Substantial evidence demonstrates convincingly that the discipline was fair, reasonable, necessary and appropriate.

A fair reading of the workplace violence policy plainly shows that it prohibits the kind of conduct under review here. Nowhere does Directive 10.0 indicate, or even hint, that the policy solely prohibits the act of physical violence. Additionally, Directive 10.0 was only a part of the reason for discipline. The pay reduction would have been proper even without reference to the workplace violence policy.

It is complainant's burden to prove by preponderant evidence that the discipline was imposed in retaliation for his filing a grievance. This he has not done. There is absolutely no credible evidence of a causal connection, or nexus, between the discipline and the grievance. The disciplinary action was taken for a

legitimate business purpose wholly apart from complainant's grievance. If he had not engaged in the misconduct of June 30, there would have been no discipline.

With respect to the corrective actions, State Personnel Board Policy 8-3-(B), 4 Code Colo. Reg. 801-1, provides in pertinent part:

Normally, no more than 2 corrective actions may be administered to an employee in any 12-month period. Thereafter, a disciplinary action shall be considered.

The corrective actions issued against this complainant fall within the purview of Policy 8-3-(B). The policy does not require that the corrective actions be currently in effect. Nor does the policy mandate that two corrective actions necessarily be administered before disciplinary action becomes warranted. Furthermore, complainant had been notified in writing that, while the appointing authority considered the corrective actions to be "concluded," there was a continuing need for complainant to improve his working relationships with other staff members. The corrective actions were never removed from the file to indicate that they should not be considered.

Complainant concedes that the issue of administrative leave was not heretofore raised. Nonetheless, he asks the judge to enter an order granting him administrative leave with pay for attending the depositions of other witnesses and to meet with his attorney. In so doing, he offers no foundation or argument upon which to conclude that respondent's action was improper. He simply makes the request, which is hereby denied.

### CONCLUSIONS OF LAW

1. Respondent's action was not arbitrary, capricious or contrary to rule or law.

2. Directive 10.0 was not unconstitutionally applied to complainant.

3. Complainant is not entitled to an award of attorney fees and costs.

### ORDER

The action of the respondent is affirmed. Complainant's appeal is dismissed with prejudice.

DATED this \_\_\_\_\_ day of  
February, 1998, at  
Denver, Colorado.

\_\_\_\_\_  
Administrative Law Judge



**CERTIFICATE OF MAILING**

This is to certify that on the \_\_\_\_ day of February, 1998, I placed true copies of the foregoing **INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE** in the United States mail, postage prepaid, addressed as follows:

Nora V. Kelly  
Attorney at Law  
1775 Sherman Street, Suite 1775  
Denver, CO 80203

and in the interagency mail, addressed as follows:

Michael E. King  
Assistant Attorney General  
Civil Litigation Section  
1525 Sherman Street, Fifth Floor  
Denver, CO 80203

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